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IN THE

Supreme Court of the United States

MINKA LIGHTING, INC.,

Petitioner,

v.

CRAFTMADE INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress first provided patent protection for the designs of articles of manufacture in 1842 to fill a statutory void that, until then, had allowed for piracy. Design patents now protect the ornamental features of products in industries across the spectrum of our economy: from electronics and automotive accessories to athletic shoes, ceiling fans and lighting fixtures, and numerous other products.

In 1871, this Court held that the proper test for design patent infringement is whether, from the perspective of ordinary purchasers, the patented and accused designs are "substantially the same." *Gorham Co. v. White*, 81 U.S. 511 (14 Wall.) 511, 528 (1871). The Federal Circuit's decisions, however, have eviscerated the ordinary purchaser test. The case below held that courts are always free to disregard competent empirical evidence that ordinary purchasers consider the accused and patented designs to be substantially the same, even at the summary judgment stage.

The questions presented are:

1. In view of this Court's longstanding statutory interpretation of the test for design patent infringement and its holding in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), was it appropriate to affirm summary judgment of non-infringement when the record included competent empirical evidence that ordinary purchasers consider the patented and accused designs to be substantially the same?

2. Whether allowing trial courts to substitute their own viewpoints on substantial similarity for that of ordinary purchasers impermissibly alters the *Gorham* "ordinary purchaser" test for design patent infringement?

LIST OF PARTIES

Minka Lighting, Inc., a California corporation, is the sole Petitioner in this action. Petitioner is the exclusive licensee of U.S. Design Patent No. 380,539 (the "patent-in-suit"). Petitioner was a co-plaintiff in the proceeding before the district court and the sole appellant in the proceeding before the Court of Appeals for the Federal Circuit.

Craftmade International, Inc., a Texas corporation, is the Respondent named in the caption of the petition.

Pan Air Electric Co., Ltd. is a company organized under the laws of Taiwan and the sole owner of the patent-in-suit. Pan Air Electric Co., Ltd. was Petitioner's co-plaintiff in the proceeding before the district court, but did not participate or appear in the proceedings before the Court of Appeals for the Federal Circuit. Pursuant to Supreme Court Rule 12.6, Pan Air Electric Co., Ltd. may also be considered a Respondent.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Petitioner Minka Lighting, Inc. states that it has no parent companies and that no publicly held corporation holds more than 10% of Petitioner's stock.

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Petitioner Minka Lighting, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in the above-entitled proceeding on January 16, 2004. A petition for rehearing and rehearing en banc was timely filed, but denied by that court on February 24, 2004.

OPINIONS BELOW

The non-precedential opinion of the Court of Appeals for the Federal Circuit is not officially reported, but is available at 2004 WL 506587 (Fed. Cir. January 16, 2004). The Federal Circuit's opinion (hereafter "*Minka II*") is reprinted in Appendix A at 1a-9a. The Federal Circuit's denial of the petition for rehearing and rehearing en banc is unreported. It is reprinted in Appendix D at 25a-26a.

The June 14, 2002 Order of the district court adopting the Findings and Recommendation of the United States Magistrate Judge and granting the defendant's motion for summary judgment of non-infringement (together with the Magistrate Judge's findings and recommendation) were not officially reported, but are available at 2002 WL 1331833 (N.D. Tex. June 14, 2002). The district court's June 14, 2002 Order is reprinted in Appendix B at 10a-11a. The Findings and Recommendation of the United States Magistrate Judge (hereafter "*Minka I*"), adopted in the district court's June 14, 2002 Order, are reprinted in Appendix C at 12a-24a.

JURISDICTION

The court of appeals' judgment [App. A, at 1a-9a] was entered on January 16, 2004. A timely petition for rehearing and rehearing en banc was denied on February 24, 2004 [App. D, at 25a-26a]. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

35 U.S.C. § 171. Patents for designs

> Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor, subject to the conditions and requirements of this title.
>
> The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided.

35 U.S.C. § 271. Infringement of patent

> (a) Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

* * *

Federal Rules of Civil Procedure: Rule 56. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure is set forth in full in Appendix E at 27a-29a.

STATEMENT OF THE CASE

This case raises questions important to a significant segment of our economy about the viability of design patent protection.[1] This Court long ago established that the proper test for design patent infringement is whether, from the perspective of "ordinary purchasers," the patented and accused designs are "substantially the same." *Gorham Co. v. White*, 81 U.S. 511 (14 Wall.) 511, 528, 530-31 (1871). In the judgment below, however, the Federal Circuit held it permissible to disregard relevant and admissible empirical evidence demonstrating that actual and potential purchasers of the product in issue (ceiling fans) consider the patented and accused designs to be substantially the same.

The Federal Circuit has expressly endorsed an analysis of design patent infringement that allows trial courts to substitute their own viewpoints – here that the patented and accused designs were not substantially the same – for those

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1. According to an April 2002 report published by the U.S. Patent and Trademark Office, companies with more than 100 design patents include industry leaders such as AT&T, Nike, Motorola, Goodyear Tire and Rubber, IBM, Black & Decker, Rubbermaid, Proctor & Gamble, American Standard, 3M, General Electric, Timex, Coca-Cola, Hunter Fan, Oneida, Moen, Daimler-Chrysler, Nikon, The Hoover Co., Compaq, Sony, and Corning. *See* United States Patent & Trademark Office, *Design Patents: January 1977 – December 2001*, pp. B-1 to B-13 (April 2002).

of ordinary purchasers. This approach both eviscerates the *Gorham* ordinary purchaser test and abuses the summary judgment standards established in *Celotex v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and progeny. Only this Court can correct this clear departure from its binding precedent.

A. Basis For Jurisdiction

The basis for jurisdiction in the court of first instance is 28 U.S.C. § 1338(a), which gives the United States district courts original and exclusive jurisdiction in cases arising under the patent laws of the United States.

B. The District Court's Summary Judgment Of Non-Infringement

Petitioner Minka Lighting, Inc. ("Minka" or "Petitioner") designs, manufactures, and sells innovative lighting and ceiling fan products and is recognized as a design leader in its industry. In 1996, designers for Minka invented a new design for a contemporary ceiling fan. Minka's new fan, the "Viper," enjoyed significant commercial success because of its unique, innovative, and attractive design. The inventor of this novel ceiling fan design applied for a design patent, and U.S. Design Patent No. 380,539 (the "'539 patent") issued on July 1, 1997. Minka is the exclusive licensee of the '539 patent.

Respondent Craftmade International, Inc. ("Craftmade" or "Respondent") is one of Minka's direct competitors. After Minka introduced its new Viper ceiling fan, Craftmade introduced a new line of contemporary ceiling fans, the "Solo" and "Cefiro" ceiling fans. The common design of

these two Craftmade fans was remarkably similar to that of Minka's patented Viper ceiling fan. In 2000, Minka filed suit for infringement of the '539 patent against Craftmade in the United States District Court for the Northern District of Texas.

After the claim construction phase was complete, Craftmade filed a motion for summary judgment of non-infringement. In opposition to Craftmade's motion for summary judgment, Minka *inter alia* submitted statistical survey and related expert evidence demonstrating that purchasers and potential purchasers of ceiling fans – *i.e.*, ordinary purchasers – found the accused Craftmade fan design to be substantially the same as the patented Minka design.[2] Minka argued that this evidence was sufficient to establish a genuine issue of material fact that precluded summary judgment of non-infringement. [*Minka I*, App. C, at 22a].

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2. CTAF A201-A215. Citations to "CTAF A _____" are to non-confidential materials included in the parties' Confidential Joint Appendix filed in conjunction with Minka's appeal to the Federal Circuit and part of the record below.

In the survey, participants compared four ceiling fans: the Minka Viper (an undisputed embodiment of the '539 patent), the accused Craftmade Solo, and two other ceiling fans. Seventy-one percent (71%) of survey participants identified the accused Solo ceiling fan as being the only fan that was substantially the same as the Minka Viper ceiling fan. Of that 71%, 94% attributed this sameness to the curved or contoured blade shape or because of the flower or star appearance of the overall fan. CTAF A205, 213-14, 215; *see also Minka I*, App. C, at 21a-22a.

The district court, however, expressly disregarded this survey evidence. Instead, the court deemed it proper to decide for itself whether or not the Minka and Craftmade designs were "substantially similar."

> As previously noted, the Court may rely "exclusively or primarily on a visual comparison of the patented design, as well as the device that embodies the design [ ] and the accused device's design" in determining infringement or non-infringement. *Based on a visual comparison* of the Viper and Solo fans, *the Court has concluded* that the patented and accused designs are not substantially similar. The survey results proffered by Minka cannot create a fact issue where none exists.

[*Minka I*, App. C, at 22a (emphasis added) (citations omitted)]. Thus, based *solely* on its own visual comparison of the designs, and contrary to Minka's competent survey evidence showing that ordinary purchasers found the designs to be substantially the same, the district court determined that "no reasonable jury could find a substantial similarity between the Craftmade Cefiro and Solo fans and the '539 patent" and that "there is no infringement as a matter of law." [*Minka I*, App. C, at 24a].

C. The Federal Circuit Affirms The District Court

On appeal, the Court of Appeals for the Federal Circuit affirmed. The Federal Circuit *inter alia* held that, even at the summary judgment stage, "a district court *may* admit ordinary observer witness testimony to determine substantial similarity, *but is not required to do so*." [*Minka II*, App. A, at 8a (emphasis added)]. Thus, according to the Federal

Circuit, it was not error for the trial court to base its non-infringement finding solely on its own visual comparison of the patented and accused products. [*Minka II*, App. A, at 8a].

REASONS FOR GRANTING THE PETITION

I.

THE DECISION BELOW IMPERMISSIBLY ALTERS THE *GORHAM* ORDINARY PURCHASER TEST BY AUTHORIZING TRIAL COURTS TO IGNORE THE VIEWS OF ORDINARY PURCHASERS ON DESIGN SIMILARITY AND SUBSTITUTE THEIR OWN CONTRARY VIEWS

A. The Proper Standard For Design Patent Infringement: The *Gorham* Ordinary Purchaser Test

Prior to 1842, industrial designs did not enjoy protection under the United States patent or copyright laws. In his February 1842 annual report, the Commissioner of Patents urged Congress to rectify this situation, observing that the then-existing system was unjustifiably detrimental to the innovators of designs for articles of manufacture and to the public at large.

> Competition among manufacturers for the latest patterns prompts to the highest effort to secure improvements, and calls out the inventive genius of our citizens. Such patterns are immediately pirated, at home and abroad. . . . If protection is given to designers, better patterns will, it is believed, be obtained since the impossibility of concealment at present forbids all expense that

> can be avoided. It may well be asked if authors can so readily find protection in their labors, and inventors of the mechanical arts so easily secure a patent to reward their efforts, why should not discoverers of designs, the labor and expenditure of which may be far greater, have equal protection afforded them?

Annual Report of the Commissioner of Patents to the 27th Congress, 2d Session (February 8, 1841) (quoted in Thomas B. Hudson, *A Brief History of the Development of Design Patent Protection in the United States* [hereafter "Hudson, *A Brief History*"], 30 J. Pat. Off. Soc'y 380, 380-81 (1948)).

Based on the Commissioner's recommendation, Congress shortly thereafter enacted the first design patent law, which *inter alia* extended patent protection to "any new and original shape or configuration of any article of manufacture."[3] Hudson, *A Brief History*, 30 J. Pat. Off. Soc'y at 381. Despite several changes in statutory language and organization, the scope of design patent protection afforded under the present statute remains substantively the same today. United States Code Title 35, Section 171 currently provides patent protection for "any new, original and ornamental design for an article of manufacture."[4]

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3. Act of August 29, 1842, ch. 263, § 3, 5 Stat. 543-44 (1842) (amended 1861; repealed 1870; current version codified as amended in 35 U.S.C. § 171). The 1842 statute underwent minor revisions in 1861, the most significant of which made changes in the duration of design patents. *See* Act of March 2, 1861, ch. 88, § 11, 12 Stat. 248 (1861) (repealed; current version codified as amended in 35 U.S.C. §§ 171, 173).

4. The language in the current statute, 35 U.S.C. § 171, requiring that a design be "new, original and *ornamental*" (emphasis added) first

(Cont'd)

This Court addressed the proper test for design patent infringement in *Gorham Co. v. White*, 81 U.S. (14 Wall.) 511 (1871). The Court began by expressly acknowledging the purpose and value of industrial design protection.

> The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public. It therefore proposes to secure for a limited time to the ingenious producer of those appearances the advantages flowing from them.

Id. at 525.

(Cont'd)
appeared in an amendment to the Revised Statutes enacted in 1902. Act of May 9, 1902, ch. 783, 32 Stat. 193 (1902), *amending* Revised Statutes, Title LX, ch. 1, § 4929 (1874) (repealed 1946; current version codified as amended in 35 U.S.C. § 171). As noted in the accompanying House Report, the 1902 Act *inter alia* replaced the word "useful" (which was added in 1870) with the word "ornamental" to alleviate confusion that arose from Congress' use of the former. *See* H.R. Rep. No. 1661, 57th Cong., 1st Sess. 1-2 (1902) (discussing case law interpreting the term "useful" in predecessor statutes). The corresponding Senate Report confirms that "[t]he object sought by the proposed amendment is to conform the existing law to the manifest requirements of design patent law as distinguished from the law governing the subject of mechanical patents." S. Rep. No. 1139, 57th Cong., 1st Sess. 1-2 (1902). The substitution of "ornamental" for "useful" is entirely consistent with the test set forth in *Gorham*, which clearly acknowledges that prior statutes also required that designs be both novel and ornamental to qualify for patent protection. *See Gorham*, 81 U.S. (14 Wall.) at 524-25.

With this in mind, the Court went on to consider what was the proper test for design patent infringement.

> We are now prepared to inquire what is the true test of identity of design. Plainly, it must be sameness of appearance, and mere difference of lines in the drawing or sketch, a greater or smaller number of lines, or slight variances in configuration, if insufficient to change the effect upon the eye, will not destroy substantial identity.

Id at 526-27. The critical issue for resolution was through whose eyes "sameness of appearance" should be measured. The lower court had concluded that this question should be considered from the viewpoint of an expert, *i.e.*, "a person versed in the designs in the particular trade in question . . . a person accustomed to compare such designs with one another, and who sees and examines the articles containing them side by side." *Id.* at 527 (internal quotation marks omitted). This Court, however, disagreed, explaining that such a test would defeat congressional intent.

> Such a test would destroy all the protection which the act of Congress intended to give. There never could be piracy of a patented design, for human ingenuity has never yet produced a design, in all its details, exactly like another, so like, that an expert could not distinguish them. . . . The purpose of the law must be effected if possible; but, plainly, it cannot be if, while the general appearance of the design is preserved, minor differences of detail in the manner in which the appearance is produced, observable by experts, but not noticed by ordinary observers, by those

> who buy and use, are sufficient to relieve an imitating design from condemnation as an infringement.

Id. at 527-28.

Design patent infringement, then, is to be measured from the perspective of *consumers*, *i.e.*, by those who "buy and use" the articles in question. The *Gorham* Court articulated the proper test as follows:

> We hold, therefore, that if, in the eye of the ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

Id. at 528.

Significantly, *Gorham* also establishes that empirical evidence demonstrating how ordinary purchasers would regard the accused and patented designs is probative in determining whether they are "substantially the same" for purposes of infringement. *Id.* at 530-31. As the Court explained:

> A large number of witnesses . . . testified that, in their opinion, there is no substantial difference in the three designs, and that ordinary purchasers would be likely to mistake the White designs for the 'cottage' (viz., that of the plaintiffs). This

> opinion is repeated in many forms of expression, as, that they are the same pattern; that the essential features are the same; *that seven out of ten customers* who buy silverware would consider them the same; that manufacturers as well as customers would consider them the same; that the trade generally would so consider them; that, though there are differences, they would not be noticed without a critical examination; that they are one and the same pattern, &c., &c.

Id. at 530 (emphasis added).

B. Federal Circuit Precedent Laid The Groundwork For Its Erroneous Decision In The Case At Bar

As the Federal Circuit itself has recognized (at least academically), *Gorham* remains the controlling decision of this Court on the subject of design patent infringement. *See Litton Sys., Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1444 (Fed. Cir. 1984). Under *Gorham*, the question of design patent infringement, like that of trademark infringement, is (or should be) measured from the perspective of ordinary purchasers, making competent empirical evidence always relevant to both inquiries.[5] Yet, the Federal Circuit's decisions allow courts to disregard at will competent empirical evidence with which they disagree. The appellate

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5. These infringement inquiries, however, differ somewhat in focus. The proper focus for trademark infringement is whether consumers are likely to be confused as to the *source* of the goods in question. Design patent infringement, however, focuses on whether consumers (*i.e.*, ordinary purchasers) view the ornamental *designs* of goods (regardless of source) to be substantially the same.

court has thus rendered the viewpoints of ordinary purchasers meaningless to the question of design patent infringement.[6]

In *Unette Corp. v. Unit Pack Co.*, the appellate court started with the innocuous observation that "[l]ikelihood of confusion as to the source of goods *is not* a necessary or appropriate factor for design patent infringement." 785 F.2d 1026, 1029 (Fed. Cir. 1986) (emphasis added). Six years later in *Braun, Inc. v. Dynamics Corp. of Am.*, 975 F.2d 815 (Fed. Cir. 1992), the Federal Circuit, relying on *Unette*, broadly stated that "[d]esign patent infringement does not concern itself with the broad issue of consumer behavior in the marketplace." *Id.* at 820.

The latter statement is contrary to *Gorham's* clear focus on likely purchaser perception and behavior. *See* 81 U.S. at 528-31.[7] It is also difficult to reconcile with other

6. The *Gorham* test is most frequently referred to as the "ordinary observer" test, but this is perhaps a misnomer to the extent it suggests that the relevant universe of "observers" extends beyond those who actually "buy and use" the patented article, *i.e.*, consumers of the product. *See Gorham*, 81 U.S. at 528. The *Gorham* Court itself refers to the relevant universe of "ordinary observers" as "ordinary purchasers." *Id.* at 530-31.

7. Taken at face value, this statement in *Braun* erroneously suggests that empirical consumer evidence has little or no probative value in the design patent infringement analysis, which is clearly at odds with *Gorham*. This is the same erroneous approach endorsed by the appellate court in the case at bar. *Braun* also strays from the objective "ordinary purchaser" standard established in *Gorham* by equating jurors (who may or may not be part of the relevant purchasing public) with the hypothetical "ordinary observers" or "ordinary purchasers" envisioned by *Gorham*. *See* 975 F.2d at 821.

pronouncements of the Federal Circuit on the subject. *See, e.g., Read Corp. v. Portec*, 970 F.2d 816, 826 (Fed. Cir. 1992) (design patent infringement "depends upon (1) the similarity of the ornamental features of the Portec device and the patented design, and (2) the *likelihood that an ordinary person would be confused* because of that similarity) (emphasis added);[8] *Goodyear Tire & Rubber Co. v. Hercules Tire & Rubber Co.*, 162 F.3d 1113, 1118 (Fed. Cir. 1998) (design patent infringement "requires that the designs have the same general visual appearance, such that it is *likely that the purchaser would be deceived into confusing* the design of the accused article with the patented design) (emphasis added).

The decision below, which expressly relies on *Braun* (and *Unette*), confirms the confusion arising from inconsistent Federal Circuit precedent. Contrary to *Gorham*, it held that courts are *never required* to consider, even at the summary judgment stage, competent empirical evidence that ordinary purchasers consider the patented and accused designs to be substantially the same. [*Minka II*, App. A, at 8a].

C. The Decision Below Impermissibly Alters The Ordinary Purchaser Test

As already noted, Minka's summary judgment evidence included a statistical survey demonstrating that purchasers and potential purchasers of ceiling fans – *i.e.*, ordinary purchasers – found the accused and patented designs to be substantially the same.[9] In affirming summary judgment, the Federal Circuit held that courts are not required to consider

8. *Read* was decided two months before *Braun*.

9. *See supra* note 2.

competent empirical evidence when they are not of a mind to do so.

> [A] district court may admit ordinary observer witness testimony to determine substantial similarity, but it is not required to do so. *Braun*, 975 F.2d at 821 ("[A fact finder] does not necessarily require empirical evidence as to whether ordinary observers would be deceived.). . . . Accordingly the district court did not abuse its discretion.

[App. A, at 8a]. The Federal Circuit's interpretation of its own precedent impermissibly alters *Gorham* by allowing courts to excise ordinary purchasers from the ordinary purchaser test.

The ultimate effect of the Federal Circuit's decision is clear. The appellate court has given the lower courts permission to ignore legitimate "ordinary purchaser" evidence with which they disagree and to decide the issue of design patent infringement, as a matter of law, based on nothing more than their own personal evaluation of the designs in question. This, quite simply, eviscerates the *Gorham* ordinary purchaser test and allows the very sort of piracy the design patent statutes were intended to prevent. Petitioner respectfully submits that the Federal Circuit's judgment warrants review and correction by this Court.

II.

THE DECISION BELOW ABUSED PROPER SUMMARY JUDGMENT STANDARDS

It is, of course, axiomatic that summary judgment is improper when there exists a genuine dispute on an issue of material fact. Fed. R. Civ. P. 56(c). When the non-moving party bears the burden of proof at trial, summary judgment is proper if the non-movant fails to make an evidentiary "showing sufficient to establish the existence of an element essential to that party's case." *Celotex*, 477 U.S. at 322.

Rule 56, however, was not intended to place an extraordinary evidentiary burden on the non-moving party in order to defeat summary judgment. As the *Celotex* Court explained:

> Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), *except the mere pleadings themselves*, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

Id. at 324 (emphasis added); *see also Anderson*, 477 U.S. at 257 ("plaintiff, to survive defendant's summary judgment motion, need only present evidence from which a jury might return a verdict in his favor").

Thus, while a non-movant may not simply rest on the pleadings or conclusory allegations to defeat a motion for summary judgment, once he or she has offered competent

evidence, the trial court is not free to disregard it. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. "[A]t the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249.[10] "Summary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* at 248.

In the case at bar, the Federal Circuit abused these established summary judgment standards. In determining summary judgment of non-infringement, the proper inquiry here was whether or not a reasonable jury could conclude that *ordinary purchasers* would find the designs to be substantially the same (the very issue Minka's survey evidence addressed). Even if a jury, or the court sitting as *fact-finder at trial*, might ultimately reject competent empirical evidence on this issue in favor of other evidence, a district court is clearly not free to do the same in the context of summary judgment. *Anderson*, 477 U.S. at 257 (non-movant's evidence is to be believed).

In affirming the district court, however, the Federal Circuit effectively treated Minka's survey evidence as either non-existent or unbelievable, neither of which is proper at summary judgment. Indeed, the appellate court expressly held that courts are *never required* to consider, even at the

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10. As the *Celotex* Court observed, Rule 56 is intended to effect a proper balance of rights between "persons asserting claims and defenses that are *adequately based in fact*" and those of opposing parties "to demonstrate, in the manner provided by the Rule, prior to trial, that the claims and defenses have *no factual basis*." 477 U.S. at 327 (emphasis added).

summary judgment stage, competent empirical evidence that ordinary purchasers consider the patented and accused designs to be substantially the same. [*Minka II*, App. A, at 8a]. As a result, the Federal Circuit approved a methodology that allows trial courts to conduct the infringement analysis not through the eyes of ordinary purchasers as *Gorham* mandates, but rather from their own personal points of view. The decision below was thus both substantively and procedurally flawed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this Petition for A Writ of Certiorari and reverse the judgment of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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